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Supreme Court, U.S.
FILED

APPENDIX

081024 DEC 19 2008

No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

AIDA L. ZIADEH
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari

To The Fourth Circuit Court Of Appeals

Petition For Writ Of Certiorari

Aida L. Ziadeh, pro se
2501 Corner Rock Rd.
Midlothian, VA 23113-2204

(804)794-7722

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

AIDA L. ZIADEH,
Plaintiff,

v. Civil Action No. 3:06cv386

UNITED STATES OF AMERICA
Defendant.

ORDER

For the reasons set forth in the accompanying Memorandum opinion, it is hereby ORDERED that the Motion to enforce Consent Order (Docket No. 52) and the Motion for Partial Stay of the Court's January 24, 2007 Consent Order Pending Resolution of the Petition's Forthcoming Motion seeking Relief from that Order (Docket No. 53) are denied.

The clerk is directed to send a copy of the Order to the plaintiff and counsel of record.

It is so ORDERED.

By: /s/ Robert E. Payne
Senior United States District Judge
Richmond, Virginia

Dated: January 17, 2008

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

AIDA L. ZIADEH,
Plaintiff,

v. Civil Action No. 3:06cv386

UNITED STATES OF AMERICA
Defendant.

MEMORANDUM OPINION

Having reviewed the Motion to enforce Consent Order (Docket No. 52) and the Motion for Partial Stay of the Court's January 24, 2007 Consent Order Pending Resolution of the Petition's Forthcoming Motion seeking Relief from that Order (Docket No. 53) and the briefs, the Court concludes that both motions must be denied.

BACKGROUND

On January 24, 2007, this action was resolved by entry of a Consent Order (Docket No. 51). In essence, the Consent Order acknowledged that the Plaintiff, Aida L. Ziadeh, was indebted to the United States in the amount of $894,161.48 plus interest as reflected in the Final Restitution Order entered in her husband's criminal case. The Consent Order imposed restrictions and requirements on the parties that related to three properties that were identified

in the consent order. In particular, the United States agreed not to initiate foreclosure proceeding on any of the three properties for one year, and the parties agreed to certain procedures and restrictions on any contemplated sale of any of the parcels of land.

The parties also agreed to cooperate "toward the market sale of the three properties at issue." And Ms. Ziadeh agreed to obtain an appraisal from an independent, license appraiser, and it was agreed that the properties would not be sold for less than the appraised amount. Further. It was provided that the express authorization of the United States was required in order for any sale of the three properties occur.

After entry of the Consent order, Ms. Ziadeh proposed to sell on e of the three properties of land identified in the Consent order and she secured an appraisal of the property in the amount of $275,000.00 The proposal sale was to Ms. Ziadeh's son for $231.000 the assessed value for tax purposes.

The United States advised Ms. Ziadeh that it would not approve the sale for the tax assessment value ($231,000) and requested an authorization to inspect the property ass well as to conduct soil tests on it, all to the end of assuring that the sale price represented fair market value of the property. Ms. Ziadeh responded by increasing the proposed sales price to $275,000 but refused to grant the requested authorization for the inspection of the land and the conduct of the soil testing. Accordingly, the United States declined to approve the sale, citing as its reason therefore the inability to verify the fair market value of the property absent the inspection and soil testing that it had requested.

Ms. Ziadeh's motion to enforce the Consent Order is, in reality , a request for an Order requiring the United States to consent to approving the sale without the consent of the United States.

DISCUSSION

A consent order is essentially a contract and is to be construed in accord with applicable contract principles. The principles here at issue are quite simple.

The plain language of the contract provides that the United States must give its consent to any proposed sale of any of the three properties. Indeed, the terms of the Consent Order and the circumstances surrounding its entry show clearly that the United States has a contractually vested interest in assuring that any property that is subject to the Consent Order is sold at the highest possible price so that the proceeds of the sale cab be applied, under the terms of the Final restitution Order, to satisfy the restitution obligation of Ms. Ziadeh's husband.

The United states has expressed the reason why it had not consented to the proposed sale to Ms. Ziadeh's son in the amount of $275,000, the appraised value. In essence, the United States states that it has several reasons to believe that the sales price does not equate to the to the fair market value of the property. First, the proposed sale involved a sale to a family member, Ms. Ziadeh's son. Second, Ms. Ziadeh has not listed the property with a realtor or otherwise attempted to market it publicly or taken any other effort to maximize the sale price. Third, the United States believe that some of the assumptions underlying the appraisal have

unnecessarily limited the appraisal value, in particular the assumption that the entire tract would be used as a single building lot notwithstanding that the appraisal indicates that there are at least two areas of the property that may be characterized as buildable. The United States further believes that the assumption that a large portion of the property cannot be built upon is not accurate. For those reasons, the United States sought authorization from the plaintiff to inspect the property and to conduct soil testing on it. That certainly is a reasonable request under the circumstances.

It is also a settled contractual principle that, if apart has a contractual right to grant or withhold consent to the act of another party to a consent, that consent cannot be unreasonably withheld. It is the plaintiff's burden here to show that the consent of the United States to her proposed sale is being unreasonably withheld. The plaintiff has made no so such showing. To the contrary, the record indicates that the reason given by the United States for refusal to agree to the sale are quite reasonable and sensible. Accordingly, there is no basis upon which the Court could intercede to require the United States to do otherwise.

CONCLUSION

For the forgoing reasons, the Motion to Enforce Consent Order (Docket No. 52) and the Motion for Partial Stay of the Court's January 24, 2007 Consent Order Pending Resolution of the Petition's Forthcoming Motion seeking Relief from that Order (Docket No. 53) will be denied.

The clerk is directed to send a copy of this Memorandum opinion to the plaintiff and counsel of record.

It is so ORDERED.

By: /s/ Robert E. Payne
Senior United States District Judge
Richmond, Virginia

Dated: January 17, 2008

Appendix C

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1154

AIDA L. ZIADEH,
Plaintiff- Appellant,

v.

UNITED STATES OF AMERICA
Defendant, Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, Senior District Judge. (3:06-cv-00386-REP)

Submitted: June 19, 2008 Decided: June 23,2008

Before Wilkinson, NIEMEYER, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Aida L. Ziadeh, Appellant Pro Se. Jonathan Holland Hambrick, Assistant United States Attorney, Richmond, Virginia for Appellee.

Unpublished opinions are not binding precedent in this circuit.
PER CURIAM:

Aida L. Ziadeh Appeals the district court's order denying her motion to compel with the consent order denying her motion for partial stay of the consent order pending resolution of the motion to compel. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Ziadeh v. United States, No. 3:06-cv-00386-REP (E.D. Va. Jan. 17, m2008) ; see Dart Drug Corp. v. Nicholakos, 277 S.E.2d 155, 158 (Va. 1981) (burden on movant to show consent unreasonably withheld). To the extent that Ziadeh challenges earlier court orders, they are not before this court. See Fed. R. App. P. 4(a)(1)(A). We dispense with oral argument because the facts are legal contentions are adequately presented in the materials before the court and argument would not aids the decisional process.

AFFIRMED

Appendix D

Filed: September 29, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1154
(3:06-cv-00386-REP)

AIDA L. ZIADEH,
Plaintiff- Appellant,

v.

UNITED STATES OF AMERICA
Defendant, Appellee.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Niemeyer and Judge Michael.

For the Court

/s/ Patricia S. Conner, Clerk

Appendix E

Filed: October 7, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1154
(3:06-cv-00386-REP)

AIDA L. ZIADEH,
Plaintiff- Appellant,

v.

UNITED STATES OF AMERICA
Defendant, Appellee.

MANDATE

The judgment of this Court, entered June 23, 2008, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/ Patricia S. Conner, Clerk

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA

v. Criminal Case No. 3:02CR273

AIDA L. ZIADEH

Government's Motion to Dismiss Indictment against Defendant Aida L. Ziadeh

COMES NOW the United States, by Counsel, and in compliance with its Plea Agreement with Defendant Joseph Ziadeh approved by the Court on December 20, 2002. Moves the Court to dismiss, without prejudice, the indictment in the case against Defendant Aida Ziadeh.

Respectfully submitted:

PAUL J. McNULTY
UNITED STATES
ATTORNEY

BY /s/ Gregg R. Nivala

Certificate of Service

On February 7, 2003 I served, via U.S. Mail, a copy of the forgoing on the following persons:

Joseph W. Kaestner. Esquire
Kaestner Pittney & Jones PC
PO Box 2462
406 West Franklin Street
Richmond, Virginia 23218

James Sheffield, Esquire
14 ½ West Leigh Street
Richmond, Virginia 23220

/s/ Gregg R. Nivala
Assistant United States Attorney

/s/ So **ORDERED** RLW 2/10/03

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA)

v. Criminal Case No. 3:02CR273

JOSEPH ZIADEH
Defendant.

FINAL RESTITUTION ORDER

It appearing to the Court that the defendant has, in his plea agreement, consented to the entry of a restitution order for the full amount if the victims' losses as determined by the Court and to pay the full amount of the restitution is mandatory pursuant to 18 U.S.C §3663A(a)(1) and deeming it proper so to do, after having considered the defendant's objections to the government's proposed restitution order, it is hereby ORDERED:

1. That within 30 days after entry of this Final Restitution Order, the defendant and the defendant's spouse, Aida L. Ziadeh, will make and deliver a note payable to the United States of America in the amount of $894,161.48 (the "Note") secured by a properly recorded Deed of Trust in real property owned by the defendant and the defendant's spouse, Aida L. Ziadeh, whether individually or jointly held (the "Property") with equity equal to $894,161.48. The Note will be due and payable immediately, will be secured by the Property, and

will be delivered to the United States Attorney for the Eastern District of Virginia, Richmond Division.

2. That the Clerk Shall receive any fund that may be delivered on behalf of the defendant.

3. That from the funds received, the clerk shall distribute the funds to all victims owed restitution of less than $30,000 and thereafter pro-rata to the remaining victims listed below. The Clerk shall make payment from available funds as such funds become available.

Victim	Restitution Owed
First Union Bank Richmond, VA 23219	$145.742.00
Gregory Poole Equipment Company PO Box 469 Raleigh NC 27602	$13,461.13
L.B. Smith, Incorporated 11425 Reames Rd. Charlotte, NC 28221	$1,359.87
Michael Underwood & Associates P.A 102 Cinema Drive, Suite C Wilmington, NC 28403	$5,559.75
Monumental Investment Corporation 4530 Hollins Ferry road Baltimore MD 212274	$241,788.00
Polote Construction Company 1810 Mills B. Lane Blvd Savannah GA 31498	$440,600.00
Richbourg's Sale and Rentals, Inc. C/O Smith, Collins & Newton, PA 7455 Cross Country Road, Suite 1 North Charleston SC 29418	$28,605.47

Southwind Survey &Engineering Inc. 201 Glen Road Garner NC 27529	$12,136.75
Sherwin D. Cribb 1144 Shipyard Blvd Wilmington NC 28412	$3,320.00
W.K. Hobbs, Incorporated 1332 Castle Hayne Road Wilmington, NC 28401-8887	$1,578.51
Total	$894,161.48

In accordance with the Judgment in a criminal case entered on April 24, 2003, this Final Restitution Order is hereby incorporated as part of the judgment in a Criminal Case in this matter.

Let the Clerk SEND certified copy of this Final Restitution Order along with a copy of the judgment in a Criminal Case entered on April 24, 2003 to all counsel of record, United States Probation, the Marshals Service, and the Bureau of Prisons.

June 10 2003
Date

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

AIDA L. ZIADEH,
Plaintiff, Counter-Defendant,

v. Civil Action No. 3:06cv386

UNITED STATES OF AMERICA
Defendant, Counter-Plaintiff.

CONSENT ORDER

Come Now the Parties to the above-styled action, and hereby agree and stipulate to the following:

1. The Plaintiff and Counter-Defendant is Aida Ziadeh, her Social Security number is ****-**-7365 and her present address is in Chesterfield County Virginia.

2. On June 5, 2006, Ms. Ziadeh filed a Complaint against the United States, seeking to quiet title on three properties on which the United States District Court had placed restraining orders. The United States filed counterclaims, seeking judgment on a defendant on a defaulted promissory note and deed of trust (on the three referenced properties) that the United States alleged that Ms. Ziadeh had signed in accordance with the Final Restitution Order entered by this Court in Criminal Case Number 3:02CR273.

3. On December 21, 2066, the Parties agreed to settle this action. Specifically, Ms. Ziadeh agrees that she is indebted to the United States, in order that the terms of the Final Restitution Order entered in Criminal Case Number 3:02CR273 may be forced, and judgment shall be entered against her in the amount of $894,161.48, plus interest[1] which said amount the United States accepts in full satisfaction of the subject indebtedness toward the debt owed by Ms. Ziadeh, jointly and severely with her husband, Joseph Ziadeh, pursuant to the Final Restitution Order entered by this Court in Criminal Case Number 3:02CR273.Furthermore. Ms. Ziadeh has agreed to dismiss her complaint against the United States, with Prejudice, and the United States agreed to dismiss its counterclaims against Ms. Ziadeh with prejudice, in exchange for Ms. Ziadeh's payment of this amount.

4. The Parties therefore agree and stipulate to the entry of this Order.

5. It is expressly and stipulated to by the Parties that Ms Ziadeh will execute a new promissory note in the amount of $894,161.48, plus interest, explicitly obligating her to her indebtedness to the United States in that amount. A signed copy of this promissory note is attached hereto.

6. It is expressly and stipulated to by the Parties that Ms Ziadeh will execute three new deeds of trust, one for each of the properties at issue. A signed copy of each new deed of trust is attached

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[1] Interest continues to accrue on this debt at the Treasury rate of 1.08%

hereto. Upon signing of these deed of trust, the United States will record the three deed of trust with the respective clerk's office in the county in which the properties are located and secure liens upon the respective properties. During the one-year period following the signing of this agreement, the United States agrees not to pursue foreclosure on the three properties at issue. However, if another entity seeks foreclosure on any of the properties (e.g., Chesterfield County, Powhatan County, or lien holder), the United States will assert the propriety of its lien in such foreclosure proceedings and collect from the distribution of sale proceeds accordingly. Any amount collected from a foreclosure proceeding will be applied toward the outstanding amount due on the judgment debt.

7. It is expressly and stipulated to by the Parties that Ms Ziadeh will endorse a release to Frank Morton, so that he is authorized to forward the funds currently held by him in escrow to the United States. The check representing such held funds shall be made payable to the Clerk of the United States District Court, the Criminal Case 3:02CR273 shall be placed in the memo portion of the check, and the check shall be mailed to the following:

United State District Court
Eastern District of Virginia
1000 East main Street, Room 307
Richmond, VA 23219
Attn: Janice Grant

The United States will then apply any funds so transmitted toward the outstanding indebtedness

owed in accordance with the Final restitution order. A signed copy of this release is attached hereto.

8. It is expressly and stipulated to by the Parties that the United States will not pursue any garnishment of any salary and/or wages earned by Ms. Ziadeh for collection of this indebtedness so long as she complies with all the terms of this agreement. The Parties further agree that the United States will not pursue any garnishment of any pension fund that is in Ms. Ziadeh's name. However, if the Parties become aware that assets that would be have been subject to garnishment due either to judgment debt herein assigned to Ms. Ziadeh or to the criminal restitution debt so owed by her husband , Joseph Ziadeh, have been transferred to any pension fund in Ms. Ziadeh's name after the date of this agreement, the Parties expressly agree and stipulate that the United States will be authorized to pursue garnishment of said pension fund to secure the outstanding judgment debt of $894,161.48, plus interest.

9. It is expressly and stipulated to by the Parties that Ms. Ziadeh and the United States will work in conjunction with each other toward the market sale of the three properties at issue. Pursuant to this arrangement, Ms. Ziadeh will obtain an appraisal of each property, which will be performed by an independent, licensed appraiser, the cost of which will be paid by Ms. Ziadeh. The sale of any of the three properties will not be allowed to proceed unless <u>at least</u> the appraised amounts attained for each property, unless otherwise agreed to by the government. No sale will be allowed to proceed without the express

authorization of the United States. When authority is so given, the United States will request the Court to release the restraining orders that are currently in place on the properties. Furthermore, if, foe whatever reason. It is determined that Ms. Ziadeh and/or her representative(s) are not acting in good-faith with the market sale of these properties, the United States is authorized to pursue collection on the promissory note and deed of trust, which may include non-judicial foreclosure on the three properties.

10. The terms of the Parties agreement explicitly do not apply to Joseph Ziadeh or his interest in any properties that he currently owns either individually or jointly with Ms. Ziadeh. Any payments received by Ms. Ziadeh will be credited to the $894,161.48, plus interest, owed by her, jointly and severally with Mr. Ziadeh, in accordance with the Final Restitution Order in Criminal Action Case Number 3:02CR273.

11. The terms of the Parties agreement explicitly apply only to the three properties at issue. If. At any time, the United States learns of Ms. Ziadeh's ownership interest in other real property that predates this agreement, it is free to pursue collection and/or foreclosure on those properties pursuant to the promissory note until the outstanding judgment debt ($894,161.48, plus interest) is satisfied. In addition, if the Parties become aware that Ms. Ziadeh has acquired an interest in other real or personal property other than the properties currently titled in her name that predate this agreement, she agree to give the United States a security interest in those properties to

secure the outstanding judgment debt of $894,161.48, plus interest. Lastly, if the Parties become aware that the title to or interest in real property has been transferred to or out of Ms. Ziadeh's name after the date of this agreement in an effort by either Ms. Ziadeh to avoid her obligation under the promissory note or by her husband, Joseph Ziadeh, to avoid his restitution obligation in Criminal Case Number 3:02CR273, Ms. Ziadeh agrees to give the United States a security interest in those properties to secure the outstanding judgment debt of she agree to give the United States a security interest in those properties to secure the outstanding judgment debt of $894,161.48, plus interest.

12. Ms. Ziadeh agrees to provide complete financial information to the United States, including the disclosure of any other properties in which she holds an interest and any companies in which she holds a position. At any time during the one-year period following the entry of this Order, Ms. Ziadeh will also be required to provide updated financial information if her financial situation is altered by changed employment, additional income, and/or the purchase of real property held in her name either individually or jointly.

13. In the event that Ms. Ziadeh fails to meet the agreement so outlined above, the United States will be authorized to pursue collection of the full amount on the judgment debt ($894,161.48, plus interest).

14. Nothing in this agreement prevents the United States from pursuing administrative offsets, including that by the Internal Revenue Services,

and Ms. Ziadeh specifically consents to the offset. Any payments applied to this claim by the Internal Revenue Service as a result of tax return offsets will be credited as a payment to the existing balance.

15. Ms. Ziadeh herby knowingly waives any rights that she may have under 28 U.S.C §3205(c)(9) to any automatic accounting.

WE ASK FOR THIS:

CHUCK ROSENGURG
United States Attorney
/ s/ Tara Louise Casey
Assistant United States Attorney
600 East Main Street, Suite 1800
Richmond, VA 23219
(804) 819-5400
VSB #43920
Counsel for United States

AIDA ZIADEH
/s/ Aida Ziadeh, pro se

On this 19th day of January 2007, in the City of Richmond, Virginia, AIDA L. ZIADEH personally appeared before me and executed this Consent Order in my presence.

/s/ Signature illegible
Notary Public

My Commission Expires: April 30, 2007

Based upon the representations made herein, this agreement is hereby APPROVED AND SO ORDERED this 23 day of January, 2007. Judgment against Aida L. Ziadeh in the amount of $894,161.48, plus interest, in favor of the United

States in accordance with Final Restitution Order entered in this Court in Criminal case Number 3:02CR273 is hereby ENTERED and this matter is DISMISSED.

The clerk is DIRECTED to set forth this judgment on a separate document pursuant to Fed. R. Civ. P.58(a)(1).

/s/ Robert E. Payne
United States District Judge

Appendix I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

AIDA L. ZIADEH,
Petitioner,

v. Case No. _____

UNITED STATES OF AMERICA
Respondent.

Comes Now the Petitioner, Aida L, Ziadeh, Pro Se, and presents this Motion for Summary Judgment.

Summary Judgment is proper if, viewed in the light most favorable to the nonmoving party, "the pleading, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact the moving party is entitled to a judgment as mater of law" Fed. Rules of Civ. Proc., Rule 56 (c); Ross v. Communications Satellite Corps., 759.F.2d 355 (4th Cir. 1985)..

The Petitioner has been harassed and beleaguered by the Respondent for several years now, and is, quite frankly, tired of it. The instant that the Court amends an indictment, the Court loses jurisdiction. See e. g., ex Parte Bain, 11 U.S. 1, 30 L.Ed. 849, 7 S.Ct. 781 (1887). The same certainly holds true when an indictment is dismissed. The

indictment against the Petitioner was dismissed by Motion of the Respondent in February 10, 2003.

Once the government dismissed the indictment, and the Court accepted such dismissal, the Court then lost jurisdiction to take any action what so ever against the Petitioner. Although the dismissal was based in part on a Plea Agreement entered into by the Petitioner's husband, that Plea Agreement does not bind the Petitioner.

The respondent has consistently insisted that the Petitioner must help her husband pay restitution. However, that is not so. The statute which gives the Court jurisdiction to impose restitution, 18 U.S.C §3663A(a)(1), authorizes the Court to do so only for losses traceable to a defendant in a criminal case. Once the indictment was dismissed against the Petitioner, she was no longer a Defendant in a criminal case, and there was no losses attributed to the offence of conviction from which to extract restitution, as there was no offense of conviction, Therefore, restitution under §3663 is improper. See Hughey v. United States, 495 U.S. 411, 109 L.Ed 2d 408, 110 S.Ct. 1979 (1990).

The Petitioner does not owe the Government one red cent. Notwithstanding the fact that the Petitioner's **husband** has been Ordered by the Court to pay restitution, that has no bearing on the Petitioner. The fact that the Petitioner owns property which could theoretically be sold to make payment toward restitution is of no moment; The Petitioner's husband has no legal claim to said property, and the Petitioner has no duty or obligation to pay any restitution Order for her husband.

Of course, it is equally clear that the Petitioner's husband cannot sign over property to which he has no title. The Petitioner does not believe that the theory of community property, even if such

were proper here, applies in a criminal case. For these reasons and others, the respondent must cease and desist from trying to pull blood out of the proverbial stone, so to speak, in seeking restitution from the Petitioner, and seek it instead from her husband.

There is nothing standing in the way of summary judgment in this case. The Respondent has no recourse at law by which to demand money from the Petitioner. The Petitioner is not a party to the Plea Agreement signed by her husband, and is not liable under the law to pay restitution for any crime allegedly committed by her husband.

There is the matter of a promissory note bearing the Petitioner's name. However, the Petitioner has no idea why anyone would place the Petitioner's name on such a document. The Petitioner has no duty or obligation at law to enter into such an agreement with her husband. Certainly the Court cannot force her to do so. The Petitioner avers that this note is improper in its entirety.

Summary judgment against the Respondent is proper because the respondent has no legal basis by which to seek any monies whatsoever from the Petitioner. The restitution Order of June 10, 2003 is completely improper, without foundation, and illegal. It effectively makes the dismissal of the charges against the Petitioner void, and forces her, without the Due Process of law, to have effective her "life, liberty or property" (or all three). The Petitioner was not convicted of a crime. Therefore, The Petitioner cannot be Ordered to pay Restitution.

Because the Petitioner owes the Government no money the restraining order which exists against

the Petitioner's properties must be rescinded. Likewise, the $4,465.67 currently held by attorney Frank Morton (monies derived from the sale of 2600 Sugerberry Lane, Midlothian, VA), must be returned to the Petitioner immediately. Contrary to the Respondent's assertion, the petitioner never agreed, either tacitly or implicitly, to pay this money toward restitution.

However, the Petitioner has since been studying the law, and has found that not only does the Court lack jurisdiction to impose restitution against the Petitioner because she was not a criminal Defendant, but also because there was no offense of conviction from which to extract the restitution.

The Respondent must, as a matter of law, be Ordered by this Honorable Court to cease and desist from seeking monies of any amount from the Petitioner. This Honorable Court should exercise its authority to impose summary judgment against the Respondent in this matter in the interest of justice.

WHEREFORE: For all the forgoing reasons and authorities, the Petitioner, Aida L. Ziadeh, Pro Se, respectfully urges this Honorable Court to issue an Order **GRANTING** summary judgment in this matter.

Dated : 12, March 2005

Respectfully Submitted,

/s/ Aida L. Ziadeh, Pro Se
2501 Corner Rock Rd.
Midlothian, VA 23113-2204

Appendix J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA

v. Criminal Case No. 3:02CR273

JOSEPH ZIADEH
Defendant.

ORDER

This matter is before the Court on the "motion for Summary judgment" submitted by Joseph Ziadeh's wife, Aida Ziadeh. The government has responded to the submission, and this matter is ripe.

The Court's final Restitution Order of June 10, 2003, required Joseph Ziadeh and Aida Ziadeh to deliver to the United States within 30 days a promissory note for $894,161.48 secured by real estate. Mrs. Ziadeh has submitted a "motion for summary judgment" Mrs. Ziadeh was originally indicted along with her husband. The government reached an agreement with her to dismiss the criminal charges against her in return for her promises to be liable for the restitution to the victims of the offenses. Mrs. Ziadeh agreed. Mrs. Ziadeh was ordered to pay restitution on the same terms as her husband and was ordered to execute a promissory note, secured be real estate, as part of the disposition

of the case. Mrs. Ziadeh has never objected to this disposition that spared her possible conviction and incarceration. She initially executed the promissory note and one deed of trust but failed to execute a deed of trust in order to secure the note in one of the jurisdictions where she owns real estate. Like her husband, she is also in contempt of the Order of June 10, 2003.

The "motion for summary judgment" is improper for several reasons. First, this is a criminal case, and summary judgment is a civil proceeding. See Federal Rule of Civil Procedure 56. Next, there is no pending case in which the Court could enter summary judgment. Third, and most important, it is Mrs. Ziadeh and not the government that has failed to comply with an order that memorialized an agreement she made in order to obtain dismissal of the indictment against her. Accordingly, Mrs. Ziadeh's "motion for summary judgment" is DENIED.

Mrs. Ziadeh is ADVISED that she may appeal this decision. Should she wishes to do so, written notice of appeal must be filed with the Clerk of the Court within 10 days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the right to appeal.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record and Mrs. Ziadeh.

March 31, 2006
Date

/s/ Richard L. Williams
Senior United States District Judge

Appendix K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA

v. Criminal Case No. 3:02CR273

JOSEPH ZIADEH
Defendant.

PLEA AGREEMENT

Paul J. McNulty, United States Attorney for the Eastern District of Virginia, and Gregg R. Nivala and David T. Maguire, Assistant United States Attorney , and the defendant, JOSEPH ZIADEH, and the defendant's counsel, pursuant to Rule 11(e) of the Federal Rules of Criminal Procedure, have entered into an agreement, the terms and conditions of which are as follows:

1. The defendant, JOSEPH ZIADEH, agreed to plead guilty to Count Nine of the indictment in this case. Count Nine charges the defendant with Bank Fraud, in violation of Title 18, United States Code, Section 1344. The maximum penalty for this offense is a maximum term of 30 years of imprisonment, a fine of $1,000,000.00 full restitution, a special assessment, and 5 years of supervise release. The defendant, also agrees to plead guilty to a Criminal Information charging him with Conspiracy to defraud the United States, in violation of Title 18,

United States Code, Section 371. The maximum penalty for this offense is a maximum term of 5 years of imprisonment, a fine of $250,000.00 full restitution, a special assessment, and 3 years of supervise release. The defendant is aware that this supervise release term is in addition to any prison term the defendant may receive, and that a violation of a term of supervise release could result in the defendant being returned to prison for full term of supervise release.

2. Before sentencing in this case the defendant agrees to pay a mandatory special assessment of one hundred dollars ($100.00) per count of conviction.

3. Pursuant to Title 18, United States Code, Section 3663A(a)(3) the defendant agrees to the entry of a Restitution Order for the full amount of the victims' losses as determined by the Court. The defendant agrees that within 30 days after sentencing in this case, the defendant and the defendant's spouse, Aida L. Ziadeh, will make and deliver a note payable to the United States of America in the full amount of restitution ordered by the Court (the "Note") secured by a properly recorded Deed of Trust in real property owned by the defendant and the defendant's spouse, Aida L. Ziadeh, whether individually or jointly held (the "Property") with equity equal to amount of restitution ordered. The Note will be due and payable immediately and will be paid from the proceeds of the Property as it is liquidated. The defendant further agrees that he will be barred for life from serving as a contractor or subcontractor on any contract with the United States or any of it's department or agencies. The

total loss, restitution victims and restitution amount are to be determined by the Court.

4. The defendant is aware that the defendant's sentence will be imposed in accordance with the sentencing guidelines and Policy Statement. The defendant is aware that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for the offenses to which the defendant pleads guilty. The defendant is aware that the Court has not yet determined a sentence. The defendant is also aware that any estimate of the probable sentencing range under the sentencing guidelines that the defendant may have received from the defendant's counsel, the United States, the probation office, is a prediction not a promise, and is not binding on the United States, the probation office, or the Court. The United States makes no promise or representation concerning what sentence the defendant will receive, and the defendant cannot withdraw a guilty plea based upon the actual sentence. The defendant is aware that Title 18, United States Code, Section 3742 affords the defendant the right to appeal any sentence imposed. Acknowledging all this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statutes of conviction (or the matter in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatever, in exchange for the concessions made by the United States in this plea agreement. This agreement does not affect the rights or obligations of the United States as set forth in Title 18, United States Code, Section 3742(b).

5. The United States will not further criminally prosecute defendant, or the defendant's spouse, Aida L. Ziadeh, in the Eastern District of Virginia for the specific conduct described in the indictment, criminal information or statement of facts. Therefore, defendant does not have immunity for crimes related to, but not specifically set out in the indictment, criminal information or statement of facts. The United States also agrees that upon the acceptance of the defendant's plea by the Court, the United States will seek to dismiss all the charges pending against the defendant's spouse, Aida L. Ziadeh, and will not further prosecute the defendant's spouse for anything set forth in the indictment, criminal information or statement of facts. Except where specifically noted, this plea agreement binds only the United States Attorney's Office for the Eastern District of Virginia and the defendant; it does not bind any other prosecutors in any other jurisdiction.

6. This agreement between the United States and the defendant is subject to approval by the Tax Division of the United States Department of Justice.

7. a. The United States agrees not to use any truthful information provided pursuant to this agreement against the defendant in any other criminal prosecution against the defendant in the Eastern District of Virginia. Pursuant to Section 1B1.8 of the Sentencing Guidelines, no truthful information that the defendant provides pursuant to this agreement will be used to enhance the defendant's guidelines range. The United States will bring this plea agreement and the full extent of

the defendant's cooperation to the attention of other prosecuting office if requested.

b. Nothing in this plea agreement restricts the Court's or Probation Office's access to information and records in the possession of the United States. Further, nothing in this agreement prevents the government in any way from prosecuting the defendant should the defendant provide false, untruthful, or perjurious information or testimony. Moreover, nothing in this agreement prevents the government from using such information in furtherance of any forfeiture action, whether criminal or civil, administrative or judicial.

c. The United States Attorney Office for the Eastern District of Virginia will not contact any other state or federal prosecuting jurisdiction and voluntarily turn over truthful information that the defendant provides under this agreement to aid a prosecution of the defendant in that jurisdiction. Should any other prosecuting jurisdiction attempt to use truthful information the defendant provides pursuant to this agreement against the defendant, the United States Attorney Office for the Eastern District of Virginia agrees, upon request, to contact that jurisdiction and ask that jurisdiction to abide by the immunity provisions of this agreement. The parties understand that the prosecuting jurisdiction retains the discretion over whether to use such information.

8. This plea agreement is not conditioned upon charges being brought against any other individual. This plea agreement is not conditioned upon any outcome in any pending investigation. This plea agreement is not conditioned upon any result in any

future prosecution which may occur because of the defendant's cooperation. This plea agreement is not conditioned upon any result in any future grand jury presentation or trail involving charges resulting from this investigation. This plea agreement is conditioned upon the defendant providing full, complete and truthful cooperation.

9. The parties agree that the United States reserve its option to seek any departure from the applicable sentencing guidelines, pursuant to Section 5K of the Sentencing Guidelines and Policy Statement, or rule 35(b) of the Federal Rules of Criminal Procedure, if its sole discretion, the United States determined that such departure is appropriate. The parties agree that in cases where the United States does file such a motion, the United States reserve its option to file a further motion under 18 U.S.C §3553(e) to permit a departure under any applicable mandatory minimum sentence, if in its sole discretion the united States determines that such a further motion is appropriate.

10. The accompanying Statement of Facts signed by the defendant is herby incorporated into the plea agreement. Defendant adopts the Statement of Facts and agrees that the facts therein are accurate in every respect and that had the matter proceeded to trail, the United States would have proved those facts beyond a reasonable doubt.

11. The defendant agrees to identify all assets over which the defendant exercises or exercised control, directly or indirectly, within the past three years, or in which the defendant has or had during that time any financial interest. The defendant agrees to take steps as requested by the United

States to obtain from any other parties any lawful means any records of assets owned at any time by the defendant. The defendant agrees to undergo any polygraph examination the United States may choose to administer concerning only such assets and to provide and/or consent to the release of the defendant's tax return for the previous five years. Defendant agrees to forfeit to the United State all of the defendant's interest in any assets of value of more than 1,000.00 that, within the last three years, the defendant owned, or in which the defendant maintained an interest, the ownership of which the defendant fails to disclose to the United States in accordance with this agreement.

12. In the event that the defendant does not fulfill his obligations in this case on or before December 31, 2003, the defendant agrees to forfeit all interests in any property that is traceable to, derived from, fungible with, or a substitute for property that constitutes the proceeds of his offense. The defendant further agrees to waive all interest in any such asset in any administrative or judicial forfeiture proceeding, whether criminal or civil, state or federal. The defendant agrees to consent to the entry of order of forfeiture for such property and waives the requirement of Federal Rules of Criminal Procedure 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment.

13. The defendant agrees to join in a motion with the United States under Rule 6(e)(3)(c) of the Federal Rules of Criminal Procedure, to disclose grand jury material to the Internal Revenue Service

for use in computing and collecting the defendant's taxes, interest and penalties, and to the civil and forfeiture section of the United States Attorney Office for use in identifying assets and collecting fines and restitution.

14. The defendant also agrees to file true and correct tax returns for the years 1998-2001 within sixty days of sentencing and pay all taxes, if any are owed, interest and penalties for the years join in a motion 1998-2001 within a reasonable time in accordance with a plan to be devised by the Probation Office.

15. The defendant also agrees to make all books, records and documents available to the Internal Service at reasonable times and places for use in computing defendant's taxes, interest and penalties for the years 1998-2001.

16. If the defendant fails in any way to fulfill completely all of the obligation under this plea agreement, the United States may seek release from any and or all obligations under this plea agreement.

17. If the defendant fails to fulfill the obligation under this plea agreement, the defendant shall assert no claim under the United States Constitution, any statute, Rule 410 of the Federal Rule of Evidence, Rule 11 (f) of the Federal Rule of Criminal Procedure, or any federal rule, that defendant's statements pursuant to this agreement or any leads derived therefrom, should be suppressed or are inadmissible.

18. Any alleged breach of this agreement by either party shall be determined by the Court in an appropriate proceeding at which the defendant's

disclosures and documentary evidence shall be admissible and at which the moving party shall be required to establish a breach of the plea agreement by a preponderance on the evidence. The proceeding established by this paragraph does not apply, however, to the United States' decision whether to file a motion based on "substantial assistance" as that phase is used in Rule 35(b) of the Federal Rules of Criminal Procedure and Section 5K1.1 of the Sentencing Guidelines and Policy Statement. The defendant agrees that the decision whether to file such a motion rests in the United States' sole discretion.

21. The defendant herby waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any record that may be sought under the Freedom of Information Act, 18 U.S.C §552, or the Privacy Act, 5 U.S.C § 552a.

22. This written agreement constitute the complete plea agreement between the United States, the defendant, and the defendant's counsel. The united States has made no promises or representations except as set forth in writing in this plea agreement. The defendant acknowledges that no threats have been made against the defendant and that the defendant is pleading guilty freely and voluntarily because the defendant is guilty, any modification of this plea agreement shall be valid only as set forth in writing in a

supplemental or revised plea agreement signed by all parties.

23. Defendant's Signature: I hereby agree that I have consulted with my attorney and fully understand all rights with respect to the pending criminal indictment or criminal information. Further, I fully understand all rights with respect to the provisions of the Sentencing Guidelines and Policy Statement which may apply in my case. I have read this plea agreement and carefully reviewed every part of it with my attorney. I understand this agreement and I voluntarily agree to it.

24. Defense Counsel Signature: I am counsel for the defendant in this case. I have fully explained to the defendant the defendant's right with respect to the pending indictment or criminal information. Further, I reviewed the provision of the Sentencing Guidelines and Policy Statement and I fully explained to the defendant the provision of those Guidelines which may apply in my case. I have carefully reviewed every part of this plea agreement with the defendant. To my knowledge, the defendant's decision to enter into this agreement is an informed and voluntary one.

Date: 12/20/02

/s/ James E. Sheffield
Counsel for Defendant

Respectfully Submitted,

PAUL J. McNULTY
UNITED STATES ATTORNEY

By: /s/ Gregg R. Nivala
Assistant United States Attorney
By: /s/ David T. Maguire
Assistant U.S. Attorney

Appendix L

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF A MERICA
Plaintiff-Appellee,
v. No. 03-4520
JOSEPH ZIADEH,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CR-02-273)

Argued: June 4, 2004

Decided: July 19, 2004

Before GREGORY and DUNCAN, Circuit Judges,
and Robert R. BEEZER, Senior Circuit Judge of the
United States Court of Appeals for the Ninth Circuit,
sitting by designation.

Affirmed by unpublished opinion. Judge Gregory wrote the opinion, in which Judge Duncan and Senior Judge Beezer joined.

COUNSEL

ARGUED: Joseph William Kaestner, KAESTNER, PITNEY & JONES, P.C., Richmond, Virginia, for Appellant. Mark Anthony Exley, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Norfolk, Virginia, for Appellee. ON BRIEF:

Raul Novo, Midlothian, Virginia, for Appellant. Paul J. McNulty,
United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See
Local Rule 36(c).

OPINION

GREGORY, Circuit Judge:

A grand jury in the United States District Court for the Eastern District of Virginia indicted Joseph Ziadeh (hereinafter "Joseph Ziadeh" or "Appellant") on twenty counts, including mail fraud, bank fraud, money laundering, bankruptcy fraud and related offenses; Appellant's wife, Aida Ziadeh, was also indicted on seventeen counts. Joseph Ziadeh entered into a plea agreement with the government, whereby he pled guilty to one count of bank fraud, in violation of 18 U.S.C. 1344, and one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and agreed to pay full restitution. As a result of Appellant's plea, the government also agreed to cease prosecution against Aida Ziadeh.

The district court imposed a sentence of thirty-seven months' imprisonment and also ordered Appellant to pay ten victims a total of $894,161.48 in restitution. Joseph Ziadeh timely filed his notice of appeal, asserting that the district court abused its discretion in failing
to conduct an evidentiary hearing before ordering restitution, and erred by failing to consider the statutory factors of the Mandatory Victims Restitution Act (the "MVRA"), 18 U.S.C. 3663A, 3664, at sentencing. The government moved to dismiss the appeal, arguing that in his plea agreement Appellant waived his right to appeal restitution. For the reasons that follow, we conclude that Appellant did not waive his right to appeal restitution and thus decline to dismiss the appeal, yet we find Appellant's claims fail on the merits. Accordingly, we affirm the restitution order imposed by the district court.

I.

Joseph Ziadeh was president of Bell Construction Company ("Bell"). In 1996, Bell received a subcontract for approximately $6million from the Army Corps of Engineers (the "Army Corps"). In 8, the Army Corps terminated Bell for poor performance and failure to pay subcontractors. At the time of termination, Bell had been paid approximately $4.4 million, and owed its subcontractors in excess of $850,000. United Pacific assumed Bell's role under the subcontract and completed the job.

In 1998, the Army Corps mistakenly mailed Bell a check for $145,742 made payable to United Pacific. Joseph Ziadeh endorsed and deposited the check, and he and Aida used the funds for personal expenses. A grand jury in the Eastern District of Virginia returned a twenty-count indictment against Appellant and his wife, charging them with offenses arising from the fraudulent check cashing as well as their scheme to defraud subcontractors. In December 2002, Appellant pled guilty to bank fraud, in violation of 18 U.S.C. 1344, and conspiracy to defraud the United States, in violation of 18 U.S.C. 371. In return for Appellant's plea, the government dismissed the remaining counts in the indictment and agreed not to prosecute Aida Ziadeh. In the plea agreement, Joseph Ziadeh waived his "right to appeal any sentence within the statutory maximum" and agreed to "entry of a Restitution Order for the full amount of the victims' losses as determined by the Court."

In April 2003, the district court sentenced Ziadeh to thirty-seven months' imprisonment on each count to be served concurrently, a sentence within the statutory maximum, and a five-year term of supervised release. With respect to restitution, the court found that the precise amounts owed to many victims were not ascertainable at the time of the hearing, thus in accord with 18 U.S.C. 3664(d)(5) it ordered the government to submit a proposed restitution order within thirty days of sentencing, to which defendant could file a response within ten days. Appellant objected to the government's recommendations, and without a hearing, the court

resolved all objections in favor of the government. As such, in June 2003, an order issued mandating restitution in the amount of $894,161.48 based on Appellant's course of fraudulent conduct.

Joseph Ziadeh timely filed a notice of appeal, and the government moved to dismiss the appeal. We issued an order deferring action on the government's motion to dismiss pending oral argument.

II.

The government argues that we should dismiss Joseph Ziadeh's appeal of the district court's restitution order because the plea agreement into which Appellant entered contained a waiver of the right to appeal sentence. Appellant counters that while he waived his right to appeal a sentence of imprisonment, the language of his plea agreement does not constitute waiver of his right to challenge the restitution order. Accordingly, Appellant does not challenge the validity of the plea agreement, he merely challenges the scope of waiver.

While the Constitution does not provide criminal defendants with a right to appeal, see Jones v. Barnes , 463 U.S. 745, 751 (1983), Congress has accorded the right to appeal sentence, see 18 U.S.C. 3742. A defendant may, however, waive this statutory right to appeal. United States v. Wiggins , 905 F.2d 51, 53 (4th Cir. 1990). We will enforce the waiver of a defendant's right to appeal contained in a valid plea agreement "so long as it is `the result of a knowing and intelligent decision to forgo the right to

appeal.'" United States v. Attar , 38 F.3d 727, 731 (4th Cir. 1994) (quoting United States v. Wessells , 936 F.2d 165, 167 (4th Cir. 1991)). If during the Fed. R. Crim. P. 11 colloquy the district court fully questions a defendant regarding the waiver of his or her right to appeal, we deem such waiver valid and enforceable. See Wessells , 936 F.2d at 167-68. The question of whether a defendant validly waived his or her right to appeal is a question of law that we review de novo. United States v. Marin , 961F.2d 493, 496 (4th Cir. 1992).

To determine whether the waiver clause bars an appeal from the restitution order, we must decide whether the appeal waiver was valid, and, if so, whether the challenge to restitution is within the scope of that waiver. See United States v. Broughton-Jones , 71 F.3d 3, 1146 (4th Cir. 1995); Attar , 38 F.3d at 731 33. Plea agreements are grounded in contract law and both parties should receive the benefit of their bargains. United States v. Ringling , 988 F.2d 504, 506 (4th Cir. 1993). We hold the government to a greater degree of responsibility for imprecision or ambiguity in the agreement. See United States v. Harvey , 791 F.2d 294, 300-01 (4th Cir. 1986). Where the terms of the agreement are ambiguous, we construe them against the government. Id. at 303. Thus, we proceed to review both the text of the plea agreement and the Rule 11 colloquy to determine whether Ziadeh waived his right to appeal restitution.

The plea agreement, in relevant part, stated the following with regard to Appellant's right to appeal:

> The defendant is aware that the defendant's sentence will be posed in accordance with the Sentencing Guidelines and Policy Statements. The defendant is aware that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for the offenses to which the defendant pleads guilty. . . . [T]he defendant knowingly waives the right to appeal any sentence within the maximum provided in the statutes of conviction (or the manner in which that sentence was determined) on the grounds set forth in [18 U.S.C. 3742] or on any ground whatever, in exchange for the concessions made by the United States in this plea agreement.

J.A. 30-31 4. As is clear, however, the waiver provision made no explicit reference to restitution.[2] Instead, the waiver provision largely referred to

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[2] With respect to restitution generally, the plea agreement stated that "defendant agrees to the entry of a Restitution Order for the full amount of the victims' losses as determined by the Court," and provided that within thirty days after sentencing Appellant and Aida Ziadeh would deliver a note payable to the government in the full amount of restitution ordered by the district court, and notes that the district court would determine total loss, restitution victims and restitution amount. J.A. 30

"sentence" in the context of the term of imprisonment. See id. (discussing "probable sentencing range" and "sentence within the maximum provided in the statutes of conviction"). As such, we find the plea agreement's waiver provision is ambiguous as to whether "sentence" includes the amount of restitution, or refers only to term of imprisonment. For example, on the one hand, restitution is part of "sentence" in the colloquial sense in that it is a determination for the district court after guilt has been adjudged[3] On the other hand, restitution is not simply "imposed in accordance with the Sentencing Guidelines and Policy Statements" as the plea agreement specifies. J.A. 30 4; cf. United States v. Ready , 82 F.3d 551, 559-60 (2d Cir. 6) (holding that term "any sentence"

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[3] As a general matter, restitution is part of a criminal sentence. See United States v. Buchey , 810 F.2d 456, 461 (4th Cir. 1987) ("Criminal restitution . . . is part of the sentencing process [and thus] is fundamentally `penal' in nature."); see also United States v. Snider , 957 F.2d 703, -07 (9th Cir. 1992) ("Restitution imposed as a component of the defendant's sentence is a criminal penalty, not a civil remedy."); United States v. Satterfield , 743 F.2d 827, 837 (11th Cir. 1984) (noting that Congress intended "to treat restitution as one of the options available to the district court in imposing an appropriate sentence"). In fact, we have previously held that restitution fell within the ambit of a more broadly worded waiver of the right to appeal a "sentence." See Broughton-Jones, F.3d at 1147 (implicitly finding that restitution fell within waiver of right to appeal sentence, but finding grounds for appeal fell outside the waiver).

within plea agreement's waiver of right to appeal provision did not include restitution because of ambiguity). Rather, Appellant's challenge is levied against the district court's determination of the victims and the amount owed Ã alleged legal errors under the MVRA, not disagreements with the district court's authority to "impose any sentence within the statutory maximum." See J.A. 30 4.

In addition, during Ziadeh's Rule 11 colloquy, the district court did not ask him about waiver of the right to appeal as it pertained to restitution. Instead, after discussing maximum terms of imprisonment, preparation of the Presentence Report, and the Sentencing Guidelines, see Tr. at 10 (No. 3:02CR273-01, E.D. Va. Dec. 20, 2002), the following exchange transpired:

THE COURT: And should I impose a sentence on you, a guideline sentence on you that is less severe than what the government thinks the guidelines call for, the United States could appeal the sentence? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And according to the plea agreement you have waived your right to appeal The Court's guideline sentence if it falls within the limits called for by the guidelines?

THE DEFENDANT: Yes, sir.

Id. at 10 (emphasis added).

No discussion of waiver as to the restitution determination took place thereafter.

In short, neither the plea agreement, nor the colloquy indicates determinatively that Joseph Ziadeh was waiving his right to challenge restitution. Instead, both the terms of the agreement and the discussion of the plea during the colloquy focus on appeal rights as to the term of imprisonment. Indeed, nowhere in the record is restitution discussed in the context of Ziadeh's waiver of appellate rights. As such, in accord with settled circuit law, see Harvey , supra, we must hold the government to its end of the bargain and resolve the ambiguous language of the agreement in favor of Appellant. If the government intended the plea agreement to include a waiver of appellate rights related to restitution, it knew full well how to include such language in the plea agreement. Because of the ambiguities within the plea agreement and the absence of curative passages concerning restitution during the plea colloquy, we hold that Joseph Ziadeh did not waive the right to bring this appeal challenging the restitution order. Accordingly, we proceed to consider Appellant's claims on the merits.

III.

On the merits, Appellant advances two interrelated arguments. Appellant asserts that while

he was allowed to object to the government's proposed restitution order, the district court abused its discretion by not holding an evidentiary hearing. Appellant claims that without such a hearing he was "not given a meaningful opportunity to be heard." Although unclear from the briefs, the crux of Appellant's denial of "a meaningful opportunity to be heard" claim seemingly centers on his contention that certain subcontractors listed in the restitution order were not victims of his fraudulent scheme. Relatedly, Appellant argues that in imposing restitution without an evidentiary hearing, the district court erred by failing to properly consider the MVRA when fashioning restitution[4].

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[4] At oral argument, Appellant's counsel raised a new issue, namely whether the district court improperly imposed restitution based on relevant conduct rather than charged conduct. Because this issue was not raised within Appellant's nine-page merits brief (inclusive of table of contents, table of authorities, issues presented, statement of the case, facts and argument) - or, for that matter, his eleven-page reply brief - we hold that argument is waived. See Cavallo v. Star Enter. , 100 F.3d 0, 1152 n.2 (4th Cir. 1996) (holding argument not raised in opening brief, but raised for the first time in reply brief was waived); see also Canady v. Crestar Mortgage Corp. , 109 F.3d 969, 973-74 (4th Cir. 7) (holding issue waived because it was not mentioned in brief, but was only raised in notice of appeal); Tucker v. Waddell , 83 F.3d 688, 690 n.1 (4th Cir. 1996) (stating issues not addressed in brief or oral argument are waived); 11126 Baltimore Blvd., Inc. v. Prince George's County, Md. , 58 F.3d 988, 993 n.7 (4th Cir. 1995) (same); United States v. Williams , 378 F.2d 665, 666 (4th Cir. 1967) (per curiam) (holding issues argued orally but not addressed in brief were waived).

A.

Appellant contends the district court's failure to hold an evidentiary hearing constitutes reversible error. As discussed above, after the sentencing hearing, the district court ordered the government to submit a proposed restitution order, detailing the victims and amounts owed because the amounts Appellant owed victims for the purposes of restitution were not readily ascertainable, pursuant to 18 U.S.C. 3664(d)(5). The government submitted its order and Appellant objected to the government's recommendations. Without holding an evidentiary hearing, the district court found defendant's objections lacked merit and ordered restitution in the amount of $894,161.48.

Section 3664(e) provides: "Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government." 18 U.S.C. 3664(e). Section 3664 does not require the district court to hold an evidentiary hearing. Rather, whether the district court should hold an evidentiary hearing is committed to the discretion of the district court, thus we review for abuse of discretion. See Cagle v. Hutto , 177 F.3d 253, 258 (4th Cir. 1999). The district court's determination of the amount of loss for restitution purposes is reviewed for clear

error. United States v. Dawkins , 202 F.3d 711, 714 (4th Cir. 2000).

Appellant argues that "because of the complex nature of the case and the contradictory evidence presented by the parties prior to sentencing," the district court abused its discretion by not holding an evidentiary hearing on the issue of restitution. Br. of Appellant at 5-6. In support of his claim, Ziadeh merely offers the bald assertion that he "has denied that certain subcontractors listed by the Government in their proposed Restitution Order were even subcontractors for the purposes of the Contract, and the Government's own listing of the Final Restitution Order bears that assertion out." Br. of Appellant at ; Reply Br. at 8. Nowhere in his briefing does Appellant specify which subcontractors should not be considered victims and which restitution amounts he continues to challenge, nor does he specify which facts he considers in "material dispute" such that an evidentiary hearing is necessary. Accordingly, it is not difficult to conclude that the district court did not abuse its discretion in failing to hold an evidentiary hearing, and did not commit error, let alone clear error, in imposing restitution of $894,161.48. See Dawkins , 202 F.3d at 714.

Appellant's plea agreement required him to make full restitution for "the full amount of victims' losses as determined by the [district] [c]ourt." J.A. 30 3. First, of the total restitution ordered, it is clear that $145,742, the amount of the Army Corps' check to Union Pacific which Appellant fraudulently received, was never in dispute before the district court. Thus,

the only amount ever in question would be the additional sums owed the subcontractors. However, the government and Joseph Ziadeh filed a "Statement of Facts" at the same time as they filed the plea agreement, and that filing demonstrates the amounts owed subcontractors were not properly in dispute. See R. Tab 25 ("Statement of Facts" Dec. 20, 2002). In the Statement of Facts, a single paragraph filing, the parties "stipulate[d] that the factual allegations contained in Count Nine of the Indictment . . . are true." Id. Significantly, Count Nine of the indictment, the bank fraud count to which Appellant pled guilty, incorporated the allegations of Count Two, "Major Fraud Against the United States," 2-11. In those stipulations, Appellant admitted to having participated in a scheme to defraud the subcontractors. See J.A. at 15-17 2-11 (detailing Appellant's scheme to defraud the Army Corps of money owed to Bell's subcontractors). Specifically, Appellant admitted to Paragraph 10 of Count Two, which stated that Bell owed its subcontractors $850,000, id. at 17 10, and that money would have been paid had Appellant and his wife not "diverted monies from [the sub-contractors] to their own use," id. at 17 8.

In sum, Appellant stipulated that the fraudulent conduct to which he pled guilty had resulted in losses totaling $995,742, an amount for which he agreed to pay "full restitution" under the terms of the plea agreement. However, when the government prepared its recommended restitution order, it traced only $748,419.48 to subcontractors in addition to the $145,742 check cashed by Appellant and his wife.

Thus, the total amount of restitution recommended, and eventually ordered by the district court, totaled $894,161.48, a sum $101,580.52 less than the amount for which Joseph Ziadeh stipulated that he was responsible[5]. In this light, we cannot conclude that the district court abused its discretion by failing to hold an evidentiary hearing, nor can we conclude that it committed a clear legal error in determining the restitution amount.

B.

Appellant also argues that we should vacate the district court's findings of restitution - or remand for further consideration - because it did not consider "mandatory statutory factors" in imposing restitution. See Br. of Appellant at 6, 8; Reply Br. at

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[5] Furthermore, at the sentencing hearing, the government, without objection, proffered an exhibit detailing approximately $879,000 in unpaid sums due the subcontractors. Thereafter, Ziadeh's counsel acknowledged on his client's behalf that "in many instances he came up short, and some of the contractors were not paid at that particular time. But it is Mr. Ziadeh's position . . . that he will pay any subcontractors, any material men, any person who has furnished work or whatever to the project . . . that the government can document that is owed. . . . And [Ziadeh] stands ready now to agree to make restitution to any of those people who were not paid." J.A. 122.

6. He asserts that pursuant to 18 U.S.C. 3664, in determining the restitution amount,

> the district court must make factual findings based on the record with respect to: amount of loss, defendant's ability to pay and financial need of the defendant and the defendant's dependents; and the relationship between restitution imposed and the loss caused by defendant's conduct. The district court failed to account for some of these statutory factors, and thus remand is appropriate.

Br. at 6; Reply Br. at 6. Appellant's contention is simply wrong as a legal matter.

The MVRA provides: "In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses . . . without consideration of the economic circumstances of the defendant ." 18 U.S.C. 3664(f)(1)(A) (emphasis added). Appellant, however, ignores this clear statutory mandate and instead relies on a case, United States v. Piche , 981 F.2d 706, 717-18 (4th Cir. 1992), which interprets § 3664 of the MVRA's superceded predecessor statute. Under the former Victim and Witness Protection Act of 1982 (the "VWPA"), § 3664 required "the district judge to balance the victim's interest in compensation against the financial resources and circumstances of the defendant." Id. (internal quotation marks and citation omitted).

As the above-quoted section of the MVRA demonstrates, however, this requirement of the former-VWPA no longer exists. In United States v. Alalade , 204 F.3d 536 (4th Cir. 2000), we explained in detail the effect of the revisions to § 3664 with the passage of the MVRA:

> [T]he plain language of the MVRA did not grant the district court discretion to reduce the amount of restitution . . . . Critically, with passage of the MVRA, Congress completely deleted the language of the VWPA affording the district court discretion in cases such as this to consider any factor it deemed appropriate in determining the amount of restitution to be ordered , see 18 U.S.C.A. § 3664(a) (West 1985) (amended 1996), and replaced it with language requiring the district court to order restitution in the full amount of loss to each victim as determined by the district court, see 18 U.S.C.A. § 3664(f)(1)(A) (West Supp. 1999). Furthermore, in contrast to the VWPA, the MVRA does not contain any language requiring the district court, in determining the total amount of restitution to be ordered, to consider the financial resources of the defendant or the financial needs
> and earning ability of the defendant and the defendant's dependents. Compare 18 U.S.C.A. § 3664(f) (West Supp.
> 9) with 18 U.S.C.A. § 3664(a) (West 1985) (amended 1996).

Id. at 540 (emphasis added); see also United States v. Chay , 281 F.3d , 686 (7th Cir. 2002) (holding the MVRA "prohibits the court from examining the defendant's ability to pay restitution"); United States v. McGlothlin , 249 F.3d 783, 784 (8th Cir. 2001) (same); United States v. Myers , 198 F.3d 160, 168-69 (5th Cir. 1999) (same); United States v. Coates , 178 F.3d 681, 683 (3d Cir. 1999) (same)[6].

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[6] In his reply brief and at oral argument, Appellant attempted to refine his MVRA claim. In his reply brief, Appellant asserts, "[t]here is no evidence in the record that the district court, after determining the full restitution amounts owed , took into consideration the financial condition of the defendant, the defendant's dependents, or whether assets are jointly controlled in determining the manner and scheduling of restitution payments." Reply Br. at 10 (emphasis added). Under the MVRA, typically the court is to consider the economic circumstances of the defendant in determining whether restitution should be paid in a lump-sum, schedule of payments, or a combination of payments at specified intervals. See 18 U.S.C. § 3664(f)(2)-(3). Even assuming this argument was not waived, see supra note 3 (citing Cavallo), we find that it would have been superfluous, or perhaps more directly, flatly contrary to Appellant's plea agreement for the district court to have conducted such an inquiry. Appellant's plea agreement vitiated the need for the district court to engage in such an analysis because it stated precisely the schedule and manner by which restitution was to be paid:

> [D]efendant agrees to the entry of a Restitution Order for the full amount of the victims' losses as determined by the Court. The defendant agrees that within 30 days after sentencing in this case , the defendant and the defendant's spouse, Aida L. Ziadeh, will make and deliver a note payable to the United States of America in the full amount of

Accordingly, Appellant's arguments that the district court erred by failing to consider his financial circumstances in determining restitution are wholly without merit.

IV.

For the reasons stated above, we deny the government's motion to dismiss the appeal and affirm the district court's restitution order.

AFFIRMED

> restitution ordered by the Court . . . secured by a properly recorded Deed of Trust in real property owned by the defendant and the defendant's spouse, Aida L. Ziadeh, whether individually or jointly held . . . with equity equal to the amount of restitution ordered.

J.A. 30 3 (emphasis added). Because this element of the plea agreement is unambiguous, Appellant's MVRA claim regarding the district court's failure to analyze his financial condition "in determining the manner and scheduling of payments" is spurious.